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No. 97-727

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

ELOISE ANDERSON, as Director of the California Department of Social Services; and the CALIFORNIA DEPARTMENT OF SOCIAL SERVICES,

Petitioners,

v.

CAPITOLA LAND, MARIA LOPEZ and JEAN MCCRUMBY,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeal Of California, Second Appellate District

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Petitioners Eloise Anderson, as Director of the California Department of Social Services and the California Department of Social Services (hereinafter referred to as "petitioners") hereby file their reply to the Brief in Opposition to Petition for Writ of Certiorari filed by Capitola Land, Maria Lopez and Jean McCrumby (hereinafter referred to as "respondents").

ARGUMENT

I

WHETHER OR NOT THERE PRESENTLY EXISTS A STATE OR FEDERAL COURT DECISION CONTRARY TO THE COURT OF APPEAL DECISION IS NOT THE ONLY CONSIDERATION IN DETERMINING THE APPROPRIATENESS OF SUPREME COURT REVIEW

Respondents argue that certiorari is premature because there are no federal or state court decisions which are contrary to the decision reached by the California Court of Appeal. However, the existence of a contrary court decision is not the only consideration in determining the appropriateness of Supreme Court review. It is well established that decisions involving the construction and application of a federal statute may be reviewed on certiorari where a sufficiently important federal question is presented, even though no contrary decision exists. See *Kolovrat et al. v. Oregon*, 366 U.S. 187, 191 (1961).

In addition, certiorari is appropriate where the federal question presented is "an important one of first impression." *American Federation of Musicians of the United*

States and Canada et al. v. Wittstein, 379 U.S. 171, 175 (1964). As the instant case involves the interpretation and construction of an important federal question involving the eligibility requirements of the federal Aid to Families with Dependent Children-Foster Care ("AFDC-FC") Program set forth at 42 U.S.C. § 672, and since the Court of Appeal's decision is totally contrary to a plain reading of the federal statute, the legislative history and federal AFDC policy, the granting of certiorari is warranted in this case.

II

THE COURT OF APPEAL'S DECISION HOLDING THAT A CHILD IS ELIGIBLE FOR AFDC-FC BENEFITS AS LONG AS THE CHILD RECEIVES AFDC IN THE FOSTER CARE HOME WILL RESULT IN SIGNIFICANT FISCAL CONSEQUENCES FOR THE STATE OF CALIFORNIA

Respondents erroneously state that "a relatively small number of children" – only those children receiving AFDC with related foster care relatives – will be affected by the Court of Appeal's decision. First, petitioners do not distinguish between children living with relatives in foster care and those living with non-relatives in determining AFDC-FC eligibility. See *Miller v. Youkim*, 440 U.S. 125, 128 (1979). Rather, petitioners maintain that in order to meet the linkage requirement, the child must have been eligible for AFDC in the home of removal and must have lived in that home within six months of the initiation of the petition, regardless of whether the child is living with a relative or nonrelative while in foster care and regardless of the child's eligibility for AFDC in the foster care home. 42 U.S.C. § 672(a)(4). Of the

approximately 105,000 children in foster care, 18,200 of these children are currently receiving Aid to Families with Dependent Children/Temporary Assistance for Needy Families benefits. Appendices A and B.[1] A significant portion of these children who were not eligible for AFDC-FC under the Department's current regulations will now be eligible for such benefits pursuant to the Court of Appeal's decision.[2]

Based upon the Court of Appeal's interpretation of 42 U.S.C. § 672(a)(4), which does not consider the language set forth in 42 U.S.C. § 672(a), respondents argue that the linkage requirement has been met because they received AFDC with the foster caretaker prior to the month the juvenile court petition was filed. However, 42 U.S.C. § 672(a) clearly focuses on children who will lose AFDC eligibility when they are removed from their homes and provides for federal foster care payments to children who would be eligible for AFDC " . . . but for [their removal

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[1] The original declarations of Patric B. Ashby and Eric Fujii are attached to petitioners' Application for Stay, which was denied by the Supreme Court on October 28, 1997.

[2] Respondents argue that the fiscal impact to the State of California cannot be raised before the United States Supreme Court because this issue was not raised in the lower courts. However, the fiscal impact to the State of California as a result of being out of compliance with federal policy was raised at every level of the judiciary. In addition, the fiscal impact caused by the Court of Appeal's decision was raised before the California Supreme Court. Pet., App. 34-36. Furthermore, it is well established that a writ of certiorari may be granted to resolve an issue which may potentially affect a large number of claimants even if it was not raised below. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992).

from the home of a relative (specified in section 606(a) (as so in effect) of this title), if [the requirements set forth in subsections (a)(1) through (a)(4) are met]." Once this subsection of section 672 is read with the isolated portion relied upon by respondents and the Court of Appeal, it is clear that the Court of Appeal's decision is contrary to a plain reading of the federal statute.

Congress intended only for those children who meet all the requirements set forth in 42 U.S.C. § 672 to be eligible for federal foster care benefits. Congress has also made it clear that should a state provide benefits to claimants who do not meet the eligibility requirements, the state is at risk of losing federal funding. 42 U.S.C. § 671. The Court of Appeal's holding that children are eligible for AFDC-FC benefits simply because they receive AFDC while in foster care requires the state to pay out the higher AFDC-FC rate to thousands of children who do not meet the express terms of the federal statute. Furthermore, the Court of Appeal's decision places the state at risk of losing federal funding for this program. Respondents' contention that the Court of Appeal's decision will not have a major fiscal impact on the State of California is therefore devoid of merit.

III

THE FACT THAT CALIFORNIA'S INTERPRETATION OF 42 U.S.C. § 672(a)(4) IS CONSISTENT WITH FEDERAL POLICY IS ANOTHER COMPELLING REASON FOR GRANTING CERTIORARI

In the present case, the language set forth in the statute establishes that AFDC eligibility is based upon the

home of removal and that the child must have lived in the home of removal within six months of the filing of the petition removing the child from that home. However, should the court determine that the statute is silent or ambiguous with regard to the linkage requirement set forth in 42 U.S.C. § 672(a)(4), it is appropriate for the Court to defer to the expertise of the administrative agencies charged with administrating the foster care program. *Chevron U.S.A. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837, 843-844 (1984); see also *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969). As stated by the Court in *Chevron*:

> We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations 'has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations. [Citations].' *Id.*, at p. 844.

In arguing that deference should not be given to the expertise of the United States Department of Health and Human Services ("DHHS"), the federal agency charged with administering the foster care program, respondents argue *Chevron* is not applicable because in *Chevron*, the agency's position was embodied in a formal regulation,

whereas the present cases involve an administrative decision.[3] However, the distinction made by respondents is specious.

As with *Chevron*, what is at issue in the instant cases is the interpretation of a federal statute by the agencies charged with its administration. It is well established that administrative agencies, in carrying out this duty, have discretion to proceed either by rulemaking or by adjudication. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 292-293 (1974); see also *American Hospital Assn. v. NLRB*, 499 U.S. 606, 611-612 (1991); *Yang v. INS*, 79 F.3d 932, 936 (9th Cir. 1996.)[4] In the present case, the position of DHHS regarding the linkage requirement is clearly set forth in its administrative decisions resulting from its adjudicatory process. Respondents' claim that the position of DHHS regarding the linkage requirement was required to be embodied in a formal regulation in order for the principle of deference to apply is therefore erroneous.[5]

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[3] Pursuant to 45 C.F.R. §§ 1355.20 and 1355.21, the United States Department of Health and Human Services is the federal agency charged with administering Titles IV-E and IV-B of the Social Security Act.

[4] This principle applies even where adjudication is used to announce new policy after years of contrary precedent. *Chisholm v. FCC*, 538 F.2d 349, 364-366, 429 U.S. 890 (D.C. Cir. 1976), cert. denied. The term " 'rule making' means agency process for formulating, amending, or repealing a rule." The term 'adjudication' means agency process for the formulation of an order." 5 U.S.C. § 551(5), (7).)

[5] In addition, respondents' reliance upon *Tovar v. U.S. Postal Service*, 3 F.3d 1271, 1277 (9th Cir. 1993) for the proposition that *Chevron* does not apply where the agency adopted "a regulation in a manner which did not allow for

Petitioners maintain that 42 U.S.C. § 672(a)(4) bases AFDC eligibility in the home of removal and requires the child to have lived in the home of removal within six months of the initiation of the petition removing the child from the home.[6] As previously argued, this interpretation is consistent with a plain reading of 42 U.S.C. § 672. However, should the Court find that section 672 is silent or ambiguous with regard to the linkage requirement,

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public comment" is misplaced since DHHS has chosen to proceed by way of adjudication, rather than by way of rulemaking. Similarly, *Pennington v. Didrickson*, 22 F.3d 1376 (7th Cir. 1994), is inapposite to the instant cases. That case held the principle of deference should not be applied where the agency's position is not supported by regulations, rulings *or* administrative practice. *Id.*, at p. 1383. Therefore, these cases have no applicability to the cases at issue.

[6] Respondents claim that Appendix G attached to their opposition establishes that, in 1991, both the federal agency and petitioners "apparently" agreed with respondents' interpretation of section 672 that AFDC linkage is based upon AFDC eligibility with whom the child lives with when the removal petition is filed. However, this letter is taken totally out of context. At the time this letter was written, petitioners sought guidance from the federal government regarding the home of removal where a child was placed in a foster care home on a temporary basis prior to the filing of the petition and then placed in a subsequent foster care home. At no time has either the California Department of Social Services or the United States Department of Health and Human Services maintained that the home in which the child lives when the petition is filed is the home with which AFDC linkage is to be established.

deference to the interpretation reached by the administrative agencies charged with the administration of the federal foster care program is totally appropriate in the instant cases.[7]

IV

RESPONDENTS AGAIN MISCONSTRUE THE LEGISLATIVE HISTORY BEHIND 42 U.S.C. SECTION 672

Respondents' argument that its position is supported by the Social Security Amendment of 1961 is based upon the false premise that, in 1961, federal funding for AFDC-FC was available for all children receiving AFDC, even if the child did not live in the home of removal. However, this contention is a total misunderstanding of the legislative history.

A review of the legislative history establishes that in 1967, the Social Security Act was amended to provide funding to those children who were not living in the home of removal at the time the petition was filed, but who had lived there within six months of the filing of the petition, and to those children who had not actually received AFDC, but were eligible for AFDC. Pet., App.

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[7] Respondents also argue that the federal agency's decision conflicts with All County Letter Number 92-33 issued by petitioners. Opp., App. F. However, a review of All County Letter Number 92-33 reveals that its purpose is to instruct the various counties to look at the name set forth in the court order in order to determine who is the relative from whom the child is removed. Neither agency has ever based AFDC eligibility for purposes of meeting the linkage requirement with the foster parent the child is living with at the time the petition is filed, as argued by respondents. Pet., App. 98.

71-72. Prior to that time, federal funding for AFDC-FC was only available to children who lived in home of removal at time petition was initiated and actually received benefits. Respondents' argument that the six month period set forth in 42 U.S.C. § 672(a)(4)(B)(ii) is irrelevant if the child is receiving AFDC in the foster care home is not supported by the legislative history.

V

RESPONDENTS' CLAIM THAT THE COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES DELAYED IN FILING THE PETITIONS HAS NO BEARING ON THE CASES AT ISSUE

Respondents argue pursuant to *California v. Taylor*, 353 U.S. 553, 557, n.2 (1957), issues or questions not raised or resolved in the lower court cannot be raised before the United States Supreme Court. However, respondents argue in their opposition that the County Department of Children and Family Services improperly delayed in filing the removal petitions.

In both the *Land* and *Lopez* cases, respondents never raised any wrongdoing on the part of the county at the trial court level. In addition, at oral argument at the California Court of Appeal, respondents' attorney informed the Court that it need not resolve the issue of whether the county improperly delayed in filing the petitions in these cases and that the Court could limit its decision to the proper interpretation of 42 U.S.C. § 672(a)(4). Furthermore, respondents failed to raise this as an issue to be resolved before the California Supreme

Court. Accordingly, respondents cannot raise the propriety of the county's actions in filing the removal petitions at the present time.

CONCLUSION

Accordingly, for the foregoing reasons, petitioners respectfully pray that a writ of certiorari issue to the California Court of Appeal, Second Appellate District, in the case at bar.

DATED: December 5, 1997

Respectfully submitted,

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APPENDIX A

DECLARATION OF PATRIC B. ASHBY IN SUPPORT OF APPLICATION FOR STAY

I, PATRIC B. ASHBY, declare and state as follows:

1. The following matters stated in this declaration are true to the best of my personal knowledge. If called as a witness, I would truthfully and competently testify consistent with the following:

2. I am the Chief of the Foster Care Branch of the California Department of Social Services ("Department"). The Foster Care branch administers the Aid to Families with Dependent Children-Foster Care ("AFDC-FC") Program set forth in 42 U.S.C. § 672. As part of my duties as Chief of the Foster Care Branch, I am responsible for supervising the implementation of federal and state laws relating to the AFDC-FC Program, formulating state regulations and setting policies for the payment of AFDC-FC benefits to those individuals meeting the eligibility requirements set forth in 42 U.S.C. § 672.

3. The California Department of Social Services administers two aid programs on behalf of eligible children who have been removed from the home of a parent or relative as the result of a court dependency order or voluntary placement agreement and are now living with caretaker relatives, the Aid to Families with Dependent Children ("AFDC")/Temporary Assistance for Needy Families ("TANF") Program and the AFDC-FC Program.[1]

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[1] The federal AFDC program has been replaced by the Temporary Assistance for Needy Families ("TANF") Program.

Children who meet the eligibility requirements set forth in Title IV-E of the Social Security Act, codified at 42 U.S.C. § 672, are paid AFDC-FC benefits. Children who do not meet the requirements set forth in 42 U.S.C. § 672 may be eligible for AFDC/TANF benefits. The AFDC-FC benefits are paid at a higher monthly rate than the AFDC/TANF benefits.

4. The California Department of Social Services enacted regulations implementing the AFDC-FC Program based upon its interpretation of 42 U.S.C. § 672. The Department's regulations are set forth in the California Department of Social Service's Manual of Policies and Procedures ("MPP"). As a condition of eligibility for federal AFDC-FC benefits, the Department's regulations require the child to be linked to the AFDC Program during the month the petition leading to the child's placement in foster care was filed or the voluntary placement agreement was signed. MPP § 45-202.31. Pursuant to the Department's regulations, this requirement is met if the child is eligible for AFDC with the parent or relative from whom removed during the month the petition for the dependency order was initiated or the voluntary placement agreement was signed and if the child lived with that parent or relative within six months of the initiation of the petition. MPP § 45-202.31 through MPP § 45-202.313.

Pub.L. 104-193, Title I, §§ 103(a)(1), 116, Aug. 22, 1996, 110 Stat. 2112, 2181. The TANF Program is codified in 42 U.S.C. § 601. California's program will continue to be called the "AFDC" Program until January 1, 1998, when new legislation becomes effective. However, the federal funding source for the state's program is the TANF Program.

5. Pursuant to 42 U.S.C. § 671, in order to receive federal funding, the California Department of Social Services is required to maintain and implement a state plan approved by the United States Department of Health and Human Services which meets the requirements set forth in 42 U.S.C. § 672. The Department's regulations implementing the AFDC-FC program are included in California's plan, which was approved by the United States Department of Health and Human Services.

6. I am familiar with the California Court of Appeal's Decision in *Land, et al. v. Anderson*, Court of Appeal Case Number B094688. In the *Land* case, the Court held that MPP §§ 45-202.311 through 45-202.313 misinterpreted 42 U.S.C. § 672(a)(4) and that the federal statute does not require linkage to the home of removal as a condition of eligibility for federal AFDC-FC benefits. The Court of Appeal further held that a child living with a caretaker relative who is eligible for AFDC in the month the petition is initiated is also eligible for AFDC-FC benefits.

7. Pursuant to the *Land* decision, most children who are not eligible for AFDC-FC benefits under the Department's current regulations will be eligible for such benefits. The Estimates Bureau of the California Department of Social Services has estimated that approximately 18,200 children currently receiving AFDC benefits will be eligible for AFDC-FC benefits pursuant to the *Land* decision. This increased cost to the State of California is estimated to exceed $50,000,000 in the first year alone if federal financial participation is not available. Should petitioners ultimately prevail on the merits, there is currently no regulation in effect which would permit the

State of California to recoup any increased benefit payments made pursuant to the *Land* decision.

8. Implementation of the *Land* decision will create fiscal uncertainty for the state of California, because it is unknown whether federal funding will be withheld for those children eligible under the *Land* decision. Both the United States Department of Health and Human Services, as well as other states, require the child to be eligible for AFDC/TANF benefits in the home of removal and require the child to have lived in the home of removal within six months of the initiation of the juvenile court petition or voluntary placement agreement.

9. The Court of Appeal's decision will also create a significant administrative burden at the state and county levels since the entire eligibility process will have to be restructured and new eligibility regulations implemented in order to be in compliance with the Court of Appeal's mandates.

10. The Department of Social Services will be filing a petition for writ of certiorari in the *Land* case. Should the Department prevail on the merits, each of the administrative activities involved in implementing the decision will have to be undertaken twice, first to implement the Court of Appeal's decision, then to undo the implementation of the Court of Appeal's decision. In addition, the increased benefit payments made pursuant to the Court of Appeal's decision, as well as the administrative time and costs expended in developing and implementing a new eligibility determination process, cannot be recovered by the state. Accordingly, petitioners respectfully request that the Court of Appeal's decision be stayed

pending a final disposition on the petition for writ of certiorari.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 16th day of October, 1997.

PATRIC B. ASHBY
Declarant

APPENDIX B

DECLARATION OF ERIC FUJII IN SUPPORT OF APPLICATION FOR STAY

I, Eric Fujii declare and state as follows:

1. I am the Chief of the Estimates Branch of the California Department of Social Services ("Department"). As Chief of the Estimates Branch, I am responsible for the development of the local assistance budget for programs administered by the Department, including the Aid to Families with Dependent Children-Foster Care ("AFDC-FC") Program. As Chief of the Estimates Branch, I have personal knowledge of the following and could competently testify thereto, if called as a witness.

2. I am familiar with the California Court of Appeal's decision in *Capitola Land et al. v. Eloise Anderson*, Court of Appeal Case Number B094688. This decision expands the eligibility of children placed with relatives for AFDC-FC benefits, which are paid out at a higher rate than the Aid to Families with Dependent Children ("AFDC")/Temporary Assistance to Needy Children ("TANF") benefits. The Department estimates that the immediate increase in the number of children potentially eligible for AFDC-FC benefits by the *Land* decision is approximately 18,200. Utilizing data reported by the counties to the Foster Care Information System, this estimate reflects the number of children currently residing with relatives and receiving AFDC/TANF benefits.

3. The monthly AFDC/TANF benefit payment is approximately $206.90 for each child. However, the average AFDC-FC payment is approximately $572.73 per

month for each child. The total increased cost of implementing the *Land* decision could therefore exceed $125,000,000. Approximately $25,000,000 of the total amount would be paid from the state's General Fund, provided that the Department receives federal financial participation. Without federal financial participation, the General Fund liability could exceed $50,000,000.

4. In addition, the increased cost to the local governments is estimated to exceed $37,000,000, assuming federal financial participation is available. In the event federal financial participation cannot be claimed, the increased cost to the counties is estimated to be $75,000,000.

5. Implementation of the *Land* decision will also create a significant administrative burden at the state and county levels. State representatives will have to amend existing policy directives and regulations governing AFDC-FC eligibility determinations. The provisions set forth in the state's Title IV-E of the Social Security Act Plan will also have to be modified.

6. In addition, as initial eligibility determinations for the AFDC-FC program are made at the county level, the county welfare departments will have to provide instruction, training and technical assistance to its representatives in order to comply with the Court of Appeal's decision. Each county will be required to identify the exact number of cases affected by the *Land* decision and then review each case identified. There will be significant costs associated with this process, the exact amount depending upon the case search method utilized. This identification process includes an electronic search of all

cases in which foster children are living with relatives and may involve coordination with the California Department of Social Services Information Services Bureau. There are approximately 47,000 cases statewide. As part of the identification process, non-automated counties will be required to conduct a case by case search of cases that cannot be identified through the Department's computer system. There are approximately 27,000 such cases statewide.

7. After identifying the children impacted by the *Land* decision, counties will be required to redetermine the eligibility of these children using the new requirements set forth in the *Land* decision. For new cases, counties will have to perform two separate eligibility determinations. First, the county will have to determine the child's eligibility in the home of removal using current regulations. If the child is not eligible under the Department's current regulations, the county will then have to redetermine the child's eligibility based upon the home of the caretaker relative.

8. If a child is determined to be eligible under the rules imposed by the *Land* decision, the case must be transferred from the AFDC Program to the AFDC-FC Program. Based upon the Department's estimates, which assumes one hour per case and an eligibility worker cost of $50.24, the cost to process 18,200 cases would be approximately $900,000.

9. In addition, implementing this decision would also significantly increase the number of eligibility determinations that county representatives would be required to perform on an ongoing basis. Children receiving

AFDC/TANF benefits are reassessed annually. However, children receiving AFDC-FC benefits are reassessed every six months. Assuming one-half hour per case, the administrative cost increase associated with this activity is estimated at $450,000.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 15th day of October, 1997.

ERIC FUJII
Declarant